Supreme Court U.S.
FILED
MAY 31 2006
OFFICE OF THE CLERK

No. 05-1388

In The
Supreme Court of the United States

TODD STEPHEN CACCAMO,

Petitioner,

v.

PEOPLE OF THE CITY OF WESTLAND,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Michigan

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Has the Petitioner shown any compelling reason for review by this Court, where his claims have been fully considered, and rejected by the Michigan trial courts, the Michigan Court of Appeals, and the Michigan Supreme Court, and the issue raised is now moot?

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW	i
COUNTER-STATEMENT OF FACTS	1
ARGUMENT	4
I. PETITIONER'S ISSUE IS MOOT	5
II. PETITIONER'S NOLO CONTENDERE PLEA WAS UNDERSTANDINGLY AND VOLUNTARILY MADE	5
III. PETITIONER HAS NOT ESTABLISHED THAT ANY ALLEGED ERROR WAS MORE THAN HARMLESS	11
CONCLUSION AND RELIEF	13

TABLE OF AUTHORITIES

Page

CASES

Guilty Plea Cases, 395 Mich 96, cert den 429 US 1108 (1975) 7, 10

People v Eloby (after remand), 215 Mich App 472 4

People v Ingram, 166 Mich App 433 (1988) 7

People v Kennebrew, 220 Mich App 601 (1996) 5

People v McAlister, 203 Mich App 495, lv den 445 Mich 914 (1994) 4

People v Robinson, 386 Mich 551 (1972) 12

People v Rowell, 14 Mich App 190, lv den 382 Mich 763 (1969) 12

People v Saffold, 465 Mich 268 (2001) 11

People v Thinel (on remand), 164 Mich App 717 (1987) 12

People v Wilhite, 240 Mich App 587 (2000) 5, 6

STATUTES AND COURT RULES

STATUTES

MCL 769.4a 1

MCL 769.4a(5) 1, 2, 3

MCL 769.26 12

MICHIGAN RULES OF COURT

MCR 6.302 ..... 6, 11

MCR 6.610 11

TABLE OF AUTHORITIES – Continued

Page

MCR 6.610(E) 6, 7

MCR 6.610(E)(1) 6, 7, 8

COUNTER-STATEMENT OF FACTS

On May 9, 2003, Petitioner Todd Caccamo entered a nolo contendere plea in the 18th District Court to violating the local misdemeanor domestic violence ordinance for the City of Westland, Michigan, Westland City Code, Section 68-67(a). (Petitioner's Appendix, pp 45-52.) This plea was taken under advisement pursuant to Michigan Compiled Laws (MCL) 769.4a. That statute allows a person who has no previous convictions for assaultive crimes to keep a conviction for domestic violence off their permanent criminal conviction history record. MCL 769.4a(5) provides:

> (5) Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against the person. Discharge and dismissal under this section shall be without adjudication of guilt and is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime.

Petitioner was sentenced on June 25, 2003, consistent with the plea agreement that the charge would be taken under advisement (Petitioner's Appendix, pp 32-44.) Petitioner was sentenced to one year of non reporting probation, required to attend a domestic violence weekend program and follow any recommendations made by that program, have absolutely no contact with the Victim and her home, and pay $300 in fines and costs, $10 judgment fee and $240 in probation costs. (Petitioner's Appendix, p 44.)

After sentencing, Petitioner filed a Motion to Set Aside his May 9, 2003, plea. At the hearing on that

Motion, Petitioner indicated that he wanted the plea set aside because the Victim was harassing him. At the hearing, the Petitioner stated:

> MR. CACCAMO: The biggest concern, your Honor is if this was a normal – assuming that whatever happened happened in any way, shape or form, if this was a normal complaint I would take this thing and run with it, but as Mr. Drouillard pointed out, this woman is not letting this thing go.
>
> In fact, you know even Mr. Lakin said to me, you know, you have nothing to worry about from Judge Bokos, you have to worry about this woman shooting you and your wife one day. And neither here or there, I would like the opportunity to clear the name because she continues to harass, she continues to contact customers and my name used to be synonymous with – with community service. Now it's synonymous with horrible things. It's horrible. [Petitioner's Appendix, 28-29].

Petitioner also complained about being required to attend a domestic violence class as a part of his sentence. (Petitioner's Appendix, pp 29-31.)

Since Petitioner has now successfully completed all of the requirements set forth by the District Court under the terms of his plea, the charge has been dismissed. As stated on p 86a of the Appendix attached to Petitioner's Application:

> if the accused fulfills the terms and conditions of probation, the court must discharge the individual from probation and dismiss the proceedings against him or her. MCL 769.4a(5). Discharge

> and dismissal is without adjudication of guilt and is not a conviction for purposes of disqualification or disabilities imposed by law for conviction of a crime. MCL 769.4a(5).

Accordingly, the relief requested in Petitioner's Application has already been granted, as the case has been dismissed, and this dismissal has therefore not affected any legal rights. Therefore, the current Application is moot.

The 18th Judicial District Court denied Petitioner's Motion to Set Aside (Petitioner's Appendix, p 31.) Petitioner, in pro per, then filed a Motion for Reconsideration, which the 18th Judicial District Court also denied in a four page written Opinion. (Petitioner's Appendix, pp 8-11.)

Petitioner, with the assistance of his fifth attorney, then appealed to the Wayne County Circuit Court, Criminal Division. In this appeal, Petitioner cited the Michigan Court Rule applicable to felony plea takings, not misdemeanors, as the rule applicable to support his position that the District Court failed to properly take or accept his plea. After hearing oral argument, the Honorable Vera Massey Jones entered an Order setting aside Petitioner's plea, and remanded the case back to the 18th District Court (Petitioner's Appendix, pp 6-7.)

Respondent, The People of the City of Westland, then filed a Motion for Reconsideration before the Honorable Vera Massey Jones, which was subsequently denied on April 8, 2004. Respondent then filed an Application for Leave to appeal the ruling of the Wayne County Circuit Court, Criminal Division with the Michigan Court of Appeals. On August 23, 2004, the Court of Appeals granted Respondent's Application for Leave to Appeal.

On February 15, 2005, after oral argument, the Court of Appeals vacated the Circuit Court's ruling and reinstated the District Court's ruling. (Petitioner's Appendix, pp 2-5.) Petitioner then filed a Motion for Reconsideration, which the Court denied on April 11, 2005. (Petitioner's Appendix, p 54.)

Petitioner then requested leave with the Michigan Supreme Court, which was denied on October 31, 2005 (Petitioner's Appendix, p 1.) Petitioner's Petition for a Writ of Certiorari now follows.

ARGUMENT

STANDARD OF REVIEW

The Court in *People v Eloby (after remand)*, 215 Mich App 472, 474-475, stated:

> After a plea has been accepted by the Trial Court, there is no absolute right to withdraw the plea. When a Motion to withdraw a plea is made after sentencing, the decision whether to grant it rests within the discretion of the Trial Court. That decision will not be overturned on Appeal unless there is a clear abuse of discretion resulting in miscarriage of justice. (Citations omitted)

Since Petitioner's Motion to Withdraw his plea was made after sentencing, the Circuit Court reviewed the District Court's decision to deny the request to withdraw Petitioner's plea for an abuse of discretion. An abuse of discretion can only be found if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505, lv den

445 Mich 914 (1994). Petitioner did not demonstrate to the Circuit Court that the District Court abused its discretion, and the Court of Appeals correctly vacated the Circuit Court's ruling. The Michigan Supreme Court therefore properly denied Petitioner's Application for Leave to Appeal.

I. PETITIONER'S ISSUE IS MOOT

Petitioner's case has been dismissed and closed by the 18th Judicial District Court as he successfully completed the terms of his probation. There is therefore, no pending matter for this Court to review.

II. PETITIONER'S NOLO CONTENDERE PLEA WAS UNDERSTANDINGLY AND VOLUNTARILY MADE

Under Michigan law, there is no absolute right to withdraw a guilty or a nolo contendere plea after the plea has been accepted by the Court. *People v Kennebrew*, 220 Mich App 601, 605 (1996). Dissatisfaction with a sentence is not grounds for withdrawing a guilty plea. *People v Wilhite*, 240 Mich App 587, 597 (2000). Furthermore, it is the defendant who has the burden of establishing "a fair and just reason for the withdrawal of the plea." *Kennebrew, supra*.

No fair and just reason for withdrawing the plea in the present case was presented to the District Court. Petitioner changing his mind because the victim is allegedly harassing him, is not a fair and just reason for withdrawing a plea. If the victim is harassing him, he does have remedies available to him under the law to end such alleged harassment. Moreover, dissatisfaction with being

required to attend a domestic violence class is not a permitted basis for setting aside a plea. *Wilhite, supra.* The District Court did not clearly abuse its discretion in denying Petitioner's request to set aside his plea, and the Court of Appeals correctly vacated the Circuit Court's ruling to the contrary.

The Circuit Court believed that the District Court did not comply with MCR 6.610(E), because it did not inquire with the Petitioner as to whether the plea was understanding and voluntary. A review of the transcript will show that the Circuit Court mistakenly believed that some additional questions or findings on the record was necessary for the District Court to find a plea understanding and voluntary. (Petitioner's Appendix, pp 12-24.)

At the oral argument, the Court stated the following:

> THE COURT: There was a problem in the Judge's recitation of the rights the client was giving up in an inquiry. I don't believe he made any inquiry about whether or not he had been threatened or promised anything. (Petitioner's Appendix, pp 13-14.)
>
> * * *
>
> But I could not find in this transcript anyplace where he was inquired as to whether anybody had threatened him or promised him anything. (Petitioner's Appendix, p 15.)

In his Brief to the Circuit Court, Petitioner focused his attention on MCR 6.302, the Court Rule applicable to felony plea takings. Pursuant to MCR 6.302, a Court in a felony case, must make specific inquiries regarding the understanding and voluntary nature of the plea. Such specific inquiries are absent from MCR 6.610(E)(1), the

court rule applicable to misdemeanors. It was this focus, that caused the Circuit Court to erroneously rely on the incorrect Court Rule. The Michigan Court of Appeals and the Michigan Supreme Court both recognized this error, and correctly applied MCR 6.610(E)(1).

The 18th District Court did comply with the applicable Court Rule, MCR 6.610(E), which, in pertinent part, provides:

> **(E) Pleas of Guilty and No Contest.** Before accepting a plea of guilty or no contest the court shall in all cases comply with this rule.
>
> (1) The court shall determine that the plea is **understanding, voluntary**, and accurate. In determining the accuracy of the plea,
>
> * * *
>
> (b) if the defendant pleads nolo contendere, the court shall not question him or her about his or her participation in the crime, but shall make the determination based on other available information.

The Court in *People v Ingram*, 166 Mich App 433, 437-438 (1988), held that a guilty plea is valid if the "defendant was sufficiently informed of his constitutional rights and the incidents of trial to warrant a conclusion that he understood what a trial is and that by tendering his plea he was knowingly and intelligently giving up his right to a trial and its consequent rights and protections."

In the *Guilty Plea Cases*, 395 Mich 96, 126 (1975), cert den 429 US 1108, this Court held:

> The rule does not require a judge to make this determination in any particular manner. **He need not**, contrary to the contention in *Burkett*, **ask the defendant whether his plea of guilty is "freely, understandingly and voluntarily made."**
>
> **The judge's determination that the plea is freely, understandingly and voluntarily made may be concluded from the judge's acceptance of the plea even though he makes no separate finding of fact on this issue.** [Bold and underline added.]

The 18th District Court followed the requirements of MCR 6.610(E)(1) regarding understanding and voluntary. The following quotes from the plea taking in the 18th District Court establish that Petitioner's plea was understanding and voluntary:

> MR. LAKIN: Is there a plea from in the file that we have to sign?
>
> THE COURT: There is.
>
> MR. LAKIN: If I could just go over it with him.
>
> THE COURT: Okay. Well, you want to take some time with him?
>
> MR. LAKIN: **No. We already know what it is.** (Petitioner's Appendix, p 46, emphasis added.)
>
> * * *
>
> THE COURT: . . . .
>
> Mr. Caccamo is going to plead no contest to a charge of domestic violence and it will be taken under advisement as long as he completes his sentence satisfactorily. Any objection to that?

MS. KURTH: No.

THE COURT: Okay. Now, that is the plea agreement, Mr. Lakin, is that correct?

MR. LAKIN: That is.

THE COURT: Mr. Caccamo, my understanding is you're going to plead no contest –

MR. LAKIN: Do you want us to go to the podium?

THE COURT: You can sit right there, if you want.

MR. LAKIN: Okay, thank you.

THE COURT: Plea no contest to a charge of domestic violence and as long as you do everything I tell you to do and complete my sentence satisfactorily, you'll have an opportunity to keep this offense off your record, **understood?**

THE DEFENDANT: **Yes, sir.** (Petitioner's Appendix, pp 46-47, emphasis added.)

* * *

THE COURT: . . .

All right. No contest means you neither admit nor deny guilt, but I determine your guilt by looking at the police report. If I'm satisfied there's a basis for these charges, I can accept your no content plea and treat it just as if you plead guilty. **Any questions about that?**

THE DEFENDANT: **No, sir.**

THE COURT: The offense carries a penalty of up to ninety days in jail and a fine of up to five hundred dollars – ninety-three days in jail and a

fine of up to five hundred dollars. Those are the maximum penalties the Court can impose.

By pleading no contest, you give up the right to have a trial. You **give up the right to have that trial before a judge or a jury**. You give up the right to be presumed innocent throughout the trial, until your guilt's established beyond a reasonable doubt by the Prosecutor. You give up the **right to remain silent and not testify during the trial**, without it used against you. You give up the right to have witnesses brought in to assist your defense and you **give up the right to cross-examine and confront anybody who might be a witness against you.** Those are the ones that you give up by pleading no contest. **And I'm sure you and Mr. Lakin went over those rights, is that correct?**

THE DEFENDANT: **Yes.**

THE COURT: **Do you have any questions at all about the rights you're giving up?**

THE DEFENDANT: **No, sir.** (Petitioner's Appendix, pp 48-50, emphasis added.)

It is clear, based on the cited case law, that the 18th District Court followed the applicable Court Rule. The Court asked Petitioner numerous times if he understood what the Court was saying, and if he had any questions. Furthermore, by accepting the plea, the Court obviously found that Petitioner understandingly and knowingly entered into it. *Guilty Plea Cases, supra.* There is no requirement, contrary to the Circuit Court's conclusion, that the District Court ask the defendant whether his plea of guilty is freely, understandingly and voluntarily made. *Guilty Plea Cases, supra.* There were no errors committed

by the District Court, and accordingly no abuse of discretion, that would provide the Wayne County Circuit Court with a basis for setting aside Petitioner's plea. The Court of Appeals correctly vacated the Circuit Court's ruling, and the Michigan Supreme Court correctly denied Petitioner's Application. This Court should follow suit.

III. PETITIONER HAS NOT ESTABLISHED THAT ANY ALLEGED ERROR WAS MORE THAN HARMLESS

Assuming arguendo that there was any error committed by the 18th District Court in taking or accepting Petitioner's plea, any such error was harmless which does not require reversal of the Court of Appeals reinstatement of the 18th District Court's ruling.

A relatively recent opinion from the Michigan Supreme Court has made it clear that there is no basis for setting aside a plea if "there was substantial, not strict, compliance with MCR 6.302." This Court in *People v Saffold*, 465 Mich 268, 276, reh den 465 Mich 1204 (2001), addressed the plea taking procedure. The Court stated that "[i]f from the record it appears that the defendant has been informed of his right to a trial and that this right is being waived by his plea of guilty, reversal is not required by the omission of any of the rights enumerated in the court rule, even the presumption of innocence."

Even if the record did not show that Petitioner's plea was understanding and voluntary, such a finding was not necessary, as the plea taken by the District Court substantially complied with MCR 6.302, and the court rule applicable to misdemeanors, MCR 6.610.

Furthermore, when an error does not contribute to the judgment, it is harmless. *People v Thinel (on remand)*, 164 Mich App 717, 721 (1987). A reviewing court may not reverse a judgment when the error is harmless. MCL 769.26. The defendant bears the burden of establishing reversible error. *People v Rowell*, 14 Mich App 190, 196, lv den 382 Mich 763 (1969).

Two inquiries are important to determining whether there was a harmless error. First, is the error so offensive to the maintenance of a sound judicial process that it can never be regarded as harmless? Second, if not so basic an error, can the reviewing court declare a belief that the error was harmless beyond a reasonable doubt? *People v Robinson*, 386 Mich 551, 563 (1972).

Petitioner has not met his burden of establishing that any alleged error committed by the District Court resulted in reversible error. Accordingly, any error, assuming there was any error, was harmless.

CONCLUSION AND RELIEF

For all of the reasons stated above and in the Court's record, Respondent respectfully requests that this Court deny the Petition and bring an end to this case.

Respectfully submitted,

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